Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DAVID G. YATER AND
PATTEE L. YATER,

PETITIONER,

vs.

HANCOCK COUNTY PLANNING
COMMISSION,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

David G. Yater
Pattee L. Yater
4591 N. S.R.9
Greenfield, IN 46140
(317)326-2131
Petitioners (PRO SE)

QUESTIONS PRESENTED

1. MAY STATE COURTS EVADE FEDERAL CONSTITUTIONAL ISSUES BY FABRICATING GROUNDS FOR DISMISSAL OF A CAUSE WHICH PRESUME FACTS NOT IN THE RECORD AND IGNORING FACTS THAT ARE?

2. MAY LOCAL GOVERNMENTAL UNITS, WITHOUT EXPRESSED STATUTORY AUTHORITY PREEMPT JURISDICTION GRANTED TO THE STATE BY THE LEGISLATURE?

3. MAY GOVERNMENTAL AGENCIES REQUIRE FORFEITURE OF CONSTITUTIONALLY PROTECTED RIGHTS AS A REQUIREMENT OR CONDITION FOR THE APPROVAL OF A LAND USE PERMIT?

4. MAY STATE COURTS IGNORE PRECEDENTS OF COURTS OF SUPERIOR JURISDICTION?

5. DID THE PLAN COMMISSION DENIAL IN THIS CAUSE VIOLATE THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARE PETITIONERS ENTITLED TO JUST COMPENSATION?

6. MAY PLAINTIFFS RECOVER THEIR COSTS IF THEY PREVAIL IN FORCED LITIGATION?

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The jurisdiction of this Court is sought on the grounds that the decision of the Indiana Court of Appeals provides for an unlawful regulatory taking of property and rights from the Claimants absent compensation as is required by the Fifth Amendment of the United States Constitution.

The decision of the Indiana Court of Appeals was issued on May 24, 1993, Petition For Rehearing was denied on July 20, 1993, and transfer to the Indiana Supreme Court denied on October 12, 1993.

This Petition is filed pursuant to 28 U.S.C.S. SEC. 1257 upon the contention that a property right has been unlawfully taken without just compensation, for the Fifth Amendment to the United State Constitution states in part "Nor shall private property be taken for public use without just compensation."

The Federal Constitutional question was raised in the initial Petition for Writ of Certiorari filed in the Hancock County Superior Court, Item 5, (App. p. 37) and argued extensively by Mr. Robak, my Counsel, in his reply brief to the Indiana Court of Appeals (App. pp. 38-42). The Court of Appeals did

recognize fully that a Federal constitutional claim had been advanced as is evidenced in their decision (App. p. 19) "That they could refrain from deciding constitutional issues if the case could be decided on narrower grounds."

ARGUMENT

The decision of record in this cause was rendered by the Indiana Court of Appeals. The decision is one which did recognize the Federal Constitutional Claim as is evidenced by the language in the decision itself. The decision is also one, we contend, that fabricates conclusions which are unsupported by any evidence in the record and ignores fact and evidence which is in the record to establish narrower grounds upon which to dismiss a Federal constitutional claim and that the decision was rendered in the spirit of avoidance to evade the Federal question.

The subdivision plan which is the subject of this appeal was denied by the Plan Commission on Sept. 20, 1990.

As Petitioners we are obligated to satisfy the minimum requirements of the Subdivision Control Ordinance of the Hancock County Code and if we comply the Plan Commission is mandated by I.C. 36-7-4-707 to grant our permit. Upon submission of our plan we were aware of two (2) sections of the ordinance with which we could not comply and we did choose to contest the Plan Commission's

jurisdiction and authority under those sections. The sections we chose to challenge were 7-39 (1) and 7-39(6). Sec. 7-39(1) of the ordinance (App. p. 54) attempts to control, modify and limit the right of access to a state highway. Our posture in regard to access rights to State Road 9 (hereinafter referred to as S.R.9) since submission of our plans has been that control of access to a state highway is conduct that is expressly reserved to the Indiana Department of Transportation (hereinafter referred to as IDOT) and that there is no statute which permits a local governmental agency to share or usurp that jurisdiction but, rather a statute which expressly prohibits such conduct. We chose to challenge Sec. 7-39(6) (App. p. 54) on the premise that its demand for compulsory dedication dictated that we give to government private property for public use without just compensation in order to receive a land use permit to which we were otherwise entitled and was a constitutionally unlawful demand under both the United States and Indiana Constitutions.

We maintained that the threat of dedication or denial was extortion and that total denial of our permit for failure to

dedicate without compensation was an unlawful act under both constitutions.

At the first Plan Commission Meeting in August of 1990 my Counsel, Mr. Robak, did not think that the Plan Commission fully understood our reasons for non-compliance with the sections in question and asked that the hearing be postponed for thirty (30) days. He requested that the Plan Commission appoint a committee to meet with us so that the issues could be clarified. A committee was appointed, a meeting held and a committee report issued. That report (App. p. 43-44) contained seven (7) conditions and stated the committee would recommend passage if we would comply with those conditions. Compulsory dedication was not a condition. During the meeting with the committee all of the areas of concern, both to the Plan Commission and ourselves, were discussed and although disagreement existed, misunderstanding did not.

At the September 20, 1990 Plan Commission Meeting Mr. Robak informed the Commission that although the State Highway Department had declined a request to identify

existing right of ways on S.R. 9 we had no objection to establishing the building set back line at the edge of the existing prescriptive easement on that road and it would be set at fifty (50') feet from that line. He also informed the Commission that we had no objection to obtaining a vacation notice or variance, from the Drainage Board, for the regulated drain which traversed lots number ten (10) and eleven (11). He informed the Commission further that we had no inclination to comply with the remaining four (4) conditions for the reasons previously discussed with their committee. Those reasons are addressed in depth later in argument.

The Plan Commission did, by unanimous vote, deny our Petition and gave no specific reason or reasons for the denial. Their written notification of denial (R. Petitioners Exhibit 5) also failed to give the specific reasons as required by I.C. 36-7-4-707. Petition for Writ of Certiorari was filed on October 20, 1990 and did lodge a Federal constitutional claim in Item 5. (App. p. 37) We did not know the specific reasons for the rejection of our Petition until the Plan Commission Responded to a Court Order issued on December 20, 1990.

The response (App. p. 46) under 13c did include failure to dedicate right of way as a cause for rejection.

Our refusal to dedicate without compensation created a confusing dilemma for the Plan Commission. They had previously been able, through coercion, to create right of way for public thoroughfares in bits and pieces from individuals and developers through their practice of enforcing the compulsory dedication of Sec. 7-39(6). That policy of establishing right of way had quite conveniently provided that previous Petitioners had to establish the front boundaries of their subdivision lots at the edge of the right of way they had so conveniently been required to establish. Those right of ways so previously established do represent land "appropriated" as defined in Sec. 7-19(s) (App. p. 55) of the ordinance and we contend that such appropriations, absent just compensation, are constitutionally unlawful.

In an attempt to alleviate the dilemma created for the Commission their committee proposed a compromise wherein they could avoid the issues we had presented in reference to sections 7-39(1) and 7-39(6). That compromise provided that

we would not be required to formally dedicate the sixty-five (65) foot strip of right of way, required by the County thoroughfare plan for S.R. 9, but we would rather be required to set aside the existing thirty (30) foot prescriptive easement, for that road and not include it as a part of any lot. They further stated that to conform to their interpretations of Section 7-37(4) (App. p. 55) we must install an accel/decel lane along those lots on S.R. 9. We did reject that compromise on the basis that to set aside the thirty (30) feet strip would force a reconfiguration of the subdivision and a net loss of viable lots and that the set aside requirement was nothing more than a thinly disguised appropriation or taking. We also refused to install the accel/decel lanes because their installation would have imposed an unwarranted economic burden in that neither the ordinance nor the State required such lanes.

The Plan Commission when considering the subdivision did have the option to grant primary approval upon the condition that we dedicate per Sec. 7-27(3) (App. pp. 55) of the ordinance, and the committee was aware of that

option. That option was not considered viable by the Commission for had they approved the plan subject to dedication we would have addressed the dedication - takings issue in a proper action of inverse condemnation and they did not wish to address such an action. They for the same reason did not want to approve the plan subject to the installation of a frontage road and in an attempt to preserve sections 7-39(1) and (6) of their ordinance chose the worst of their alternatives and denied approval of the entire subdivision which in effect unlawfully took from us all right to the residential use for which the property is zoned.

We do not honestly think that the Plan Commission ever grasped the concept embodied in the takings clause of the Fifth Amendment or that when property and rights are taken from so few for a public purpose which will benefit so many that compensation could possibly be required under any circumstance. The prevailing decision of the appellate court has led to a circumstance whereby the Court of Appeals did preclude the Plan Commission from using as reason for rejection our refusal to comply with Sec. 7-39(6) but the Plan

Commission continues, even today, to enforce that section with other Petitioners. We, therefore, must conclude that the Plan Commission did not nor have they yet grasped the constitutional implications of their actions.

The Appellate Court did establish that narrower grounds existed upon which they could justify the action of the Plan Commission and thereby avoid the Federal Constitutional Claim. The Court isolated three (3) areas: lot size, drainage and manner of access upon which they based those narrower grounds. The decision of the Court of Appeals is replete with error and such error will be addressed on the isolated issues in the order in which they appear in the decision.

LOT SIZE

The entire argument presented by the Court of Appeals regarding lot size is nullified by one simple fact. There is no thoroughfare right of way nor any thoroughfare easement, whatsoever, as defined by the controlling ordinance, on the property which is the subject of this cause. Sec. 7-19(s) of the ordinance defines right of way as:

> "A strip of land appropriated ... (App. p. 55)

It further defines easement under Sec. 7-19(h) as:

> "A grant by a property owner for the use of a strip of land by the general public..." (App. p. 56)

None of the property, which is the subject of this matter, has ever been appropriated nor has any grant ever been made. The record may be searched forever but no evidence will be found to support a contention that any right of way or easement as defined by the ordinance exists on our property nor that lot size as submitted does not conform precisely to the standard set forth by Sec. 7-82 of the code. (App. p. 57)

The Plan Commission has at no point contested the fact that we own the subject property. Legal descriptions of the property were submitted with the plans, as required, to the Plan Commission. Those legal descriptions describe and define the boundaries of our property. The Plan Commission has insisted that a lot's size must be exclusive of any

thoroughfare right of way or easement. We would concur that right of way can not be part of a subdivision lot for it would by definition of the ordinance be property which had been appropriated and no longer owned by a Petitioner but in this instance, no defined right of way exists.

We can not concur that a thoroughfare easement must be excluded from lot size. In this instance no grant has been made and that which exists is a prescriptive easement, or one which exists through long standing custom and use, and at no point in the ordinance does it state that lot size must be exclusive of any easement be it prescriptive or by grant. The ordinance does in fact provide that utility easements are incorporated as part of a lot in Sec. 7-42(1) (App. p. 58) and the ordinance utterly fails to distinguish one easement from another. The Appellate Court itself states:

> "although" front property line" is not defined by the ordinance, we can give the term it's generally accepted meaning, zoning ordinance, Sec. 7-118, and conclude that the front property line refers to the boundary of the lot." (App. p. 7 & 8)

This is the precise argument that we have advanced since day one, that the front property line of our lots is the front boundary and that, absent any previous appropriation, is the center of the roads. The Courts have simply refused to recognize that no right of way as defined by the controlling ordinance in Sec. 7-19(s) exists on our property.

In general conversation the terms right of way and easement are usually synonymous and interchangeable but in this instance the controlling ordinance chose to define the terms and apply a distinct meaning and the Plan Commission was bound to observe its own ordinance for also in the words of the Appellate Court itself:

> "the requirement that a zoning ordinance contain a concrete standard is dictated by due process considerations. (Tippecanoe County Area Plan Commission v. Sheffield Developers, Inc. (1979), 181 Ind. 586, 394 N.E.2d 176.
> A standard must be written with sufficient precision to give fair warning as to what the commission will consider in making its decision." (App. p. 15)

We also submit that the Plan Commission may argue exhaustively about a lots definition and requirements but have offered no evidence that the lots as submitted do not have sufficient area for the proper installation of a septic system and that they do not conform precisely to the requirements of Sec. 7-82. Therefore, the decision of the Plan Commission to deny our permit because the lot size did not conform to the ordinance is error and the Court's decision that disapproval was sustained by a reasonable interpretation of the ordinance and evidence is contrary to the ordinance itself and the record lacks any necessary evidence to support such a conclusion.

DRAINAGE

There is no dispute of the fact that the Wicker-Dorman regulated drain traverses lots number 10 and 11 which front on State Road 9 nor of the fact that the drain has been non-operational for forty (40) years nor of the fact that alternate drainage was installed in 1979 to divert the storm water to the Harry White regulated drain nor of the fact that the distal arm of the Wicker-Dorman drain East of State Road 9, serving no

function and being non operational, should have been properly vacated by the Drainage Board long ago.

The technical committee of the Plan Commission included as standing members a County Commissioner, Noble Snodgrass, a member of the Drainage Board, for the County Commissioners are the Drainage Board, and the County Surveyor, David Smoll, under whose jurisdiction regulated drains fall. They recognized the foregoing facts and the technical committee did recommend approval upon a condition that we obtain either a vacation of the drain or a variance to negate its effect on lots number 10 and 11. Lot number 11 was intentionally oversized at 46,000 sq. ft. so that the lot line between lots number 10 and 11 could be altered to include enough area for the installation of a septic system on both lots in the event the Drainage Board chose to issue the variance, which would have reduced the easement from 150 to 50 feet to comply with Sec. 7-41(10). (App. p. 58) Such design also provided the option to amend the primary plat, prior to final approval, and divide lot number 11 into two (2) lots in the event the Drainage Board chose to vacate the drain.

In the event that the Drainage Board had refused to grant either a vacation or variance both lots would have simply been stricken from the plan prior to final approval.

We are not novices and have appeared before the Plan Commission on previous occasions for subdivision approval and were well aware of the Plan Commission's standing policy of granting primary approval of a subdivision subject to the condition that the drainage plan for the subdivision be approved by the Drainage Board prior to final approval. That policy is confirmed to exist per the testimony of Jerry Haynes, the Plan Commission Director at the time of the hearing. (App. pp. 49) Section 7-13(e) of the ordinance under purpose states that a purpose of the ordinance is:

> "To secure equitable handling of all subdivision plan by providing uniform procedures and standards". (App. p. 58)

We state that at no time did the Plan Commission inform us that in this instance we were being required to obtain a partial approval of the drainage plan prior to primary approval nor is there any evidence that such a notice

was issued or that we were so informed that this instance was an exception to the standing rule of procedure.

My Counsel cited the precedent in Johnson County Plan Commission v. Ramshead Corp. on this issue and the Court stated:

> "unlike the Plan Commission in Ramshead, which prematurely denied the Petition before drainage plans could be approved by the Drainage Board, this Commission made its determination only after the developers had indicated their intent not to approach the Drainage Board for a variance or vacation of the drain." (App. p. 20)

Such is not the fact. The stipulation of the Parties, Petitioner's Exhibit 1 (App. pp. 50) Item 9, and the Plan Commission response to Writ of Certiorari, item 7, (App. p. 45-47) set forth plainly that we informed the Plan Commission that we had no objections to obtaining a variance or vacation from the Drainage Board.

We do not argue that lot size is the purview of the Plan Commission but do argue that lot size was given just

and due consideration and that the Plan Commission did deviate without notice from its long standing standard and uniform practice and that in fact we are not indistinguishable from Ramshead on the basis the Court espoused.

The Court also ignored Sec. 7-27(3) of the ordinance which sets forth that a preliminary plat is a guide to the preparation of a final plat (App. pp. 55) and Sec. 7-27(4) (App. p. 56) which provides specifically that storm drainage must be approved by the Hancock County Commissioners, also the Drainage Board, subsequent to preliminary approval and that storm drainage is precisely the drainage that regulated drains address. For all of the foregoing reasons we contend that the drainage issue does not provide narrower grounds for dismissal of the Federal question.

MANNER OF ACCESS

On this issue the Court of Appeals misinterpreted, by definition, State Law, fabricated a conclusion unsupported by the record, upheld a Plan Commission requirement which has no basis and ignored precedents established by Courts with superior jurisdiction.

I.C.9-21-19-1 states:

> "A person may not construct a private entrance, driveway or approach connecting with a highway in the State Highway system...without a written permit from the Indiana Department of Transportation (IDOT)."

I.C. 36-1-8-8 states: "Powers Specifically Prohibited";

> "A unit of [local government] does not have ...(7) the power to regulate conduct that is regulated by a state agency except as expressly granted by statute".

Black's Law Dictionary revised Fourth Edition defines conduct as: "...any positive or negative act" (page 367) and express as "clear; definitive; explicit; unmistakable; ...made known distinctly and explicitly and not left to inference... the word is usually contrasted with implied." (page 691)

Therefore, the grant or denial of an access permit to a state highway is an act positive or negative and as such conduct which is expressly reserved to IDOT and the conclusion of the Court that they may by implication confer

jurisdiction to the Plan Commission to deny such access absent an express grant of such authority by Statute is error of and by definition. There is no express grant by statute under which the Plan Commission may either grant or deny access to a state highway and the Court's attempt to cite I.C. 8-23-6-6 as such is error for that statute refers to excavations or construction openings into a highway and not access onto a highway.

The Court introduces further error when it maintains that its 1975 decision in City of Richmond v. S.M.O. INC establishes that the legislature did not intend for IDOT to have exclusive say over the manner of access to a state highway for the legislature did make its intent known when in 1980 it passed I.C.36-1-8-8 (West 1992) enacted in 1980 and amended in 1987 and 1990 which quite effectively negated that decision by stating that an express statutory grant is necessary for local government to engage in such conduct.

The Court also determined that a legitimate state or public interest was advanced by the denial because "a multiplicity of access points creates unacceptable hazards."

(App. p. 27-28) Where, we ask, is there any evidence in the record to support such conclusion? How did the Court fail to consider the recommendation of the Plan Commission's own committee that eleven access points would be acceptable if we would construct an accel/decel lane or the testimony of Dwayne Myers of IDOT who stated that if the subdivision were approved "more than likely IDOT would grant eleven individual access permits"? (App. pp. 51-53) If IDOT considered a multiplicity of access points to create unacceptable hazards then S.R. 9 would have been declared a limited access road long ago and the record contains absolutely no evidence to support the Court's conclusion.

This Court in Lucas v. South Carolina Coastal Counsel set forth the proposition that government, to prevail, must offer more than a declaration or conclusory assertion to support a land use restraint. We ask, is not the Indiana Appellate Court bound to recognize such standard?

The Court also chose to ignore the holding of the Federal Court in Triple G. Landfills Inc. v. Board of Commissioners of Fountain County. In that decision the

Court stated:

> "The fact that ... may not have intended to preempt local regulations... is irrelevant, since it takes a statute to save an ordinance that regulates conduct regulated by a State agency." at 532

We did, in fact, express that we had no inclination whatsoever to install an accel/decel lane for the eleven lots which front S.R. 9. The reason is quite simple in that the controlling ordinance does not define such lanes and there is no section which requires them. The condition therefore was an unlawful demand per I.C. 36-7-4-707, for it exceeded the standards of the subdivision control ordinance..

The Appellate Court on page 21 of its decision attempts to justify its decision. We must of necessity take issue with the Court. We ask, how can the Court by a simple wave of the judicial wand declare our property to be landlocked? How can we force the State to grant access to S.R. 9 if such right does not already exist? How can we be construed as responsible for defeating and rendering

ineffective Sec 7-39(1) of the ordinance when the legislature through I.C. 36-1-8-8(7) has already done so? Where is there any evidence that the use we propose is inconsistent with other land use in the area or that it will create any unreasonable harm to others and does the Court through this published decision pronounce to the state that we shall now, regardless of the legislatures intent and in order to save the state from its constitutional obligation, permit local governmental agencies to unlawfully preempt the states jurisdiction to deny land use permits and declare such actions to be a reasonable application of the police power and therefore exempt from any constitutional obligation?

We disagree with the summary of the Court in that lot size for each lot in the subdivision does contain 23,000 square feet as measured within the prescribed boundaries of the lots. We did not refuse to obtain a drainage variance or vacation ruling from the Drainage Board. The imposed condition regarding installation of acceleration/deceleration lanes was an excessive and unlawful demand and the Plan Commission's attempt to limit access to S.R. 9 exceeded their

lawful jurisdiction for no statute exists which expressly grants them such authority. Thus the narrower grounds isolated by the Court as justification to avoid a Federal constitutional claim are not valid and the Court by its own proclamation did recognize the claim. This Court in the Lucas decision did further clarify takings precedent under the U.S. Constitution and, under light of that decision, we do submit:

1. The Plan Commission has presented no background principles of nuisance or property law which preclude the use of our property as we have proposed.

2. They have presented no evidence that permits granted to others in the past for the use we now intend stand in jeopardy of revocation.

3. They have provided no evidence that the use we intend will create any unreasonable hazard to the public nor that any legitimate state or public interest is advanced to support the denial.

4. The denial has denied us an economically viable use of our land and;

It is clear that had IDOT denied access permits to S.R. 9 they would have by law been required to compensate (testimony Dwayne Myers). Therefore, we contend that the Plan Commission can presume no less a burden, for as the Appellate Court did state in its decision:

> "Ingress and egress is a property right which can not be substantially or materially interfered with or taken without just compensation." State v. Ensley (1960) 240 Ind. 472, 487, N.E. 2d 342; Huff v. Indiana State Highway Commission (1958) 238 Ind. 280, 286, 149 N.E. 2d 299 (App. pp. 28-29)

42 USCS Section 4654 provides that a Plaintiff, if he prevails, in a takings claim against a Federal agency is entitled to recover reasonable attorney fees and costs. We ask the Court, should not a state or local governmental unit also be so obligated if a Plaintiff prevails? We respectfully contend that when we were compelled by law to either concede to government or litigate to defend our rights that such process, although lawful, imposed a burden not of our

making. We further respectfully contend that the constitutional requirement, in the event we prevail, that we receive just compensation cannot be fulfilled if we are required to take from compensation the expenses of the litigation process imposed upon us. We further respectfully contend that instances do occur wherein the anticipated costs of litigation exceed the value of a taking be it permanent or temporary and that local and state governmental agencies should be compelled to consider the consequences of their actions, for under the prevailing system of procedure they are required to consider only that their burdens may be avoided by compelling Petitioners to proceed through the process of litigation. State and local governmental agencies under the prevailing circumstance have no incentive to address Federal constitutional claims when presented in the first instance but rather have strong incentive to avoid or ignore them for the cost of litigation will force abandonment and forfeiture of some claims for the simple fact that the cost of litigation, if it must be taken from compensation, is not an economically viable option and such are the ways of state

and local governmental agencies.

For all of the reasons herein espoused the action of the Plan Commission to deny our subdivision was, we contend, a "taking" as embodied in the Fifth Amendment of the Untied States Constitution and we are entitled to just compensation for such taking, be it permanent or temporary, plus attorney fees and Court costs incurred to provide that such just compensation is received.

We ask the Court to reverse the decision of the Indiana Court of Appeals and to order that remedy which is most appropriate in the circumstance presented.

Respectfully submitted pro se for circumstance dictates that such must be so.

Respectfully submitted,

by David G. Yater
David G. Yater

by Pattee L. Yater
Pattee L. Yater

David G. Yater
Pattee L. Yater
Pro Se
4591 N. S.R.9
Greenfield, IN 46140
(317)326-2131

Mr. Gregg H. Morelock
COHEN & MORELOCK
Attorneys at Law
P. O. Box 187
Greenfield, IN 46140
(317)462-7787